Office-Supreme Court, U.S.
FILED
FEB 22 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1182

IN THE

Supreme Court of the United States

October Term, 1982

SOUTHERN PACIFIC TRANSPORTATION COMPANY,
Petitioner,

vs.

JIMMY L. NORMAN,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Plaintiff and Respondent, Jimmy L. Norman, hereby opposes the Petition for Writ of Certiorari of Defendant and Petitioner, Southern Pacific Transportation Company, seeking review of the opinion herein of the United States Court of Appeals for the Ninth Circuit. That opinion is reproduced as Appendix A to Southern Pacific's Petition of Certiorari.

Southern Pacific's petition is meritless and should be denied.

The principal issues raised by Southern Pacific are (1) whether the standard instruction on causation given in countless Federal Employers Liability Act cases (Devitt & Blackmar, Federal Jury Practice and Instructions (3 Ed., 1977), Instruction 94.13) correctly reflects controlling statutory and decisional law (45 U.S.C. §51; *Rogers v. Missouri Pacific Railway Co.* (1957) 352 U.S. 500), and (2) whether damages for future pain and suffering may be awarded in FELA

actions without an affirmative medical showing that future pain and suffering will occur.

Neither issue warrants the attention of this Court.

As for Southern Pacific's contention that the standard FELA causation instruction was incorrect, that contention rests on a gross misreading of the decisions on the subject and it finds conflict and confusion where absolutely none exists. In fact, the Courts of Appeals have approached unanimity as to what juries should and should not be told about causation in FELA cases and they have uniformly approved the instruction here objected to, which is directly based on this Court's authoritative decision in the *Rogers* case.

As for Southern Pacific's contention that damages for future pain and suffering in FELA cases must rest on medical testimony, that contention turns on a purported principle of law in support of which Southern Pacific has cited no federal law even remotely in point and it completely ignores substantial medical evidence in the record herein. Moreover, the issue has not been properly preserved, since Southern Pacific failed to make any objection to the jury instruction (also drawn for Devitt & Blackmar) by which the jury was told that it *could* award damages for future pain and suffering on the evidence before it.

These contentions and others subsidiary to them will be discussed at greater length below.

Statement of the Case.

Plaintiff was injured on May 11, 1978, when he tripped over a shovel handle and fell to the ground as he attempted to dismount from the bed of a "tamper," a rail-mounted utility vehicle used in the leveling of rail lines. Substantial and credible evidence established that, while Plaintiff may have been to some extent at fault for failing to keep an adequate lookout for his own safety, so too were his su-

pervisors and the driver of the tamper, who were responsible for seeing to it that work rules which required that all objects transported on the tamper be secured were enforced.

Plaintiff was shaken up in his fall but felt no immediate pain. Later that day and in the following days, however, he began to experience serious discomfort and was placed off work by his family physician. During the next three and one-half to four months, he remained off work and received physical therapy and ultrasound treatments as an inpatient and as an outpatient at a local hospital. Plaintiff returned to light duty in September, 1978, but lasted only two weeks on the job before his back pain sent him back to the doctor. He was again placed off work and again received physical therapy both on an inpatient and outpatient basis. He returned to work again on October 30, 1978, was off again with back problems from January 3 to January 22, 1979, and from March 15 to May 7, 1979, remaining on the job more or less continuously thereafter up to the time of trial in August of 1980. He continued at the time of trial to experience nearly constant aching in his back, which would be exacerbated upon mild exercise. Also he suffered intermittent numbness and tingling in his left leg. There had been no material change in his condition in the previous six months, and no doctor had held out any prospect of a cure for his condition. He had never experienced back problems prior to the accident.

In November of 1979, Plaintiff was examined by a board certified radiologist who took a "thermogram" of Plaintiff's back and legs. The thermogram (or "heat picture") disclosed irritation of the fifth lumbar nerve on Plaintiff's left side, which the radiologist believed to be due to a herniated lumbar disc pressing on the nerve root or to scarring of the nerve root, either of which would be a consequence of the

accident. Thermography is an accepted and scientific method for objectively verifying complaints like Plaintiff's.

Plaintiff brought an FELA action against Southern Pacific in the federal District Court for the Central District of California. The case was tried to a jury. On the issue of causation, the jury was instructed as follows:

> "For the purposes of this action injury or damage is said to be caused or contributed to by an act or failure to act when it appears from a preponderance of the evidence in the case that the act or omission played any part, no matter how small, in bringing about or actually causing the injury or damage. So if you should find from the evidence in the case that any negligence of the defendant contributed in any way toward any injury or damage suffered by the plaintiff, you may find that such injury or damage was caused by the defendant's act or omission. Stated another way, an act or omission is the cause of injury or damage if the injury or damage would not have happened but for the act or omission, even though the act or omission combined with other causes." [RT 512; CR 22, p. 29.]

This instruction was drawn *verbatim* from Instruction 94.13 of Devitt & Blackmar, Federal Jury Practice and Instructions (3d Ed., 1977.) Southern Pacific objected to this instruction and offered two alternative instructions which substituted for the phrase "played any part, no matter how small" the phrase "played any part whatever" or the phrase "proximately contributed in whole or part or played any part." These alternative instructions were refused. The jury was also instructed that it could award damages both for Plaintiff's past pain and suffering and for any future pain and suffering "which you find from the evidence in the case that he is reasonably certain to suffer in the future." This instruction was drawn unchanged from Instruction 85.05 of

Devitt & Blackmar. This instruction was not objected to by Southern Pacific.

The jury found Plaintiff to have been damaged to the extent of $150,000. The jury's finding as to damages was not apportioned among wage loss, past pain and suffering and future pain and suffering. The jury attributed to Plaintiff fifty percent of the fault for the accident under the standard comparative negligence instructions given it. This yielded to Plaintiff a net recovery of $75,000, plus interest and costs.

Southern Pacific appealed, raising in the Ninth Circuit Court of Appeals essentially the same contentions it raises in this Court. The Court of Appeals, in a brief three-page *per curiam* opinion filed on November 24, 1982, rejected those contentions.

REASONS FOR DENYING THE WRIT.

A. Devitt & Blackmar Instruction 94.13 Accurately States the Rule of Causation Applicable in FELA Cases and There Is No Conflict or Confusion in the Courts of Appeals on This Point.

1. The causation instruction given the jury herein was taken without modification from Instruction 94.13 of Devitt & Blackmar, Federal Jury Practice and Instructions (3d Ed., 1977), as already seen. The Devitt & Blackmar instruction states in pertinent part that in an FELA action an injury is deemed to be caused by an act or omission "when it appears from a preponderance of the evidence in the case that the act or omission played any part, no matter how small, in bringing about or actually causing the injury. . . ." The quoted language has its source in *Rogers v. Missouri Pacific Railway Co., supra*, 352 U.S. 500, 505, where this Court acknowledged that a standard of causation more liberal than the traditional common law standard applies in FELA actions and held that

> ". . . the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought."

Rogers is in turn bottomed upon the terms of the FELA, which provides in pertinent part as follows:

> "Every common carrier by railroad . . . shall be liable for damages to any person . . . for such injury or death resulting in whole or in part from the negligence of . . . such carrier . . ." (45 U.S.C. §51.)

A comparison of the portion of the Devitt & Blackmar instruction quoted above with the language just quoted from *Rogers* will reveal that while appropriate adjustments were

made in the language from *Rogers* by the drafters of the instruction to reflect that a different quantum of evidence is necessary to warrant a jury finding than to require submission of an issue to the jury, the instruction obviously constitutes a faithful paraphrase of *Rogers*' holding as to the applicable standard of causation.

The Devitt & Blackmar instruction has existed in substantially its present form since at least 1961 (see 28 FRD 497) and there can be no question that it has been given in this form in literally hundreds and thousands of cases, without any hint or suggestion in any reported decision that it is not a correct statement of the holding of *Rogers* or that it conflicts in any way with the controlling statute. Indeed, many cases on the subject actually approve the instruction question and instructions substantially like it. (See, *e.g.*, *Weese v. Chesapeake & O. Ry. Co.* (CA6th, 1978) 570 F.2d 611, 614 [use of "however small" language approved]; *Funseth v. Great Northern Railway* (CA9th, 1968) 399 F.2d 918, 921-922 [use of *Rogers* "even the slightest" language and of "no matter how small" approved]; *Tyree v. New York Central Railroad Co.* (CA6th, 1967) 382 F.2d 524, 529 [Devitt & Blackmar instruction mentioned with approval]; *Iannocito v. Denver & Rio Grande Western Railroad* (CA10th, 1967) 380 F.2d 1019 [Devitt & Blackmar instruction approved]; *Morrison v. New York Central Railroad Co.* (CA6th, 1966) 361 F.2d 319, 320 [Devitt & Blackmar instruction approved]; *De Lima v. Trinidad Corp.* (CA2d, 1962) 302 F.2d 585, 587-588 [instruction in *Rogers* language required if plaintiff requests it]; *Dutton v. Southern Pac. Trans. Co.* (Tex.S.Ct., 1978) 576 S.W.2d 782 [Devitt & Blackmar "no matter how small" language approved]; *Waller v. Southern Pac.* (1967) 66 Cal.2d 201, 213, 57 Cal.Rptr. 353, 424 P.2d 937 [use of *Rogers* language approved]; *Parker v. Atchison, Topeka & S.F. Ry. Co.* (1968)

263 Cal.App.2d 675, 677, 70 Cal.Rptr. 8 [Devitt & Blackmar instruction mentioned with approval.]

The cases just cited ought to be dispositive of the issue, case, but Southern Pacific purports to find confusion and uncertainty in a number of the decisions of the Courts of Appeals. (Petition, pp. 9-10, 14.) All of this alleged conflict, however, is a pure figment of Southern Pacific's imagination.

There are, to be sure, a number of cases which approve language drawn from the controlling statute itself, in lieu of or in addition to the language of *Rogers*. (See *e.g., Ely v. Reading Co.* (CA3d, 1976) 424 F.2d 758, 762; *Hausrath v. New York Central Ry. Co.* (CA6th, 1968) 401 F.2d 634, 638; *Funseth v. Great Northern Railway, supra,* 399 F.2d 918, 911-912; *Iannacito v. Denver & Rio Grande Western Railroad, supra,* 380 F.2d 1019, 1021.) Nothing in any of these cases, however, calls into question the authorities approving instructions based on the language of *Rogers*. These cases simply stand for the proposition that the rule of causation applicable in FELA cases is not so esoteric that it can be expressed only in one form of words and that so long as the proper rule is fairly and correctly stated, that is sufficient.

In addition, as Southern Pacific points out, various cases involve instructions which contain both language from *Rogers* or the statute, setting forth the more liberal rule of causation applicable in FELA actions, and also language describing the traditional common law standard of causation. These cases are likewise free of confusion and conflict. These cases uniformly recognize that the FELA rule represents a departure from the common law rule and that the FELA rule must govern. The only ostensible conflict in those cases is that, on widely different facts, some hold that there is no prejudicial error in using language describing

common law concepts of causation so long as the FELA standard is clearly stated (see, *e.g.*, *Idzojtic v. Pennsylvania Railroad Co.* (CA3d, 1970) 431 F.2d 1029, 1034; *Ely v. Reading Co.*, *supra*, 424 F.2d 758, 762; *Funseth v. Great Northern Railroad*, *supra*, 399 F.2d 918, 921-922; *Tyree v. New York Central Railroad Co.*, *supra*, 382 F.2d 524, 527-529; *Morrison v. New York Central Railroad Company*, *supra*, 361 F.2d 319, 320-321) while others find prejudicial error where the FELA standards are not stated with sufficient force and clarity to make it obvious to the jury that they predominate or are not stated at all. (*Almandarez v. Atchison, Topeka & S. F. Ry. Co.* (CA5th, 1976) 426 F.2d 1095, 1097; *Hausrath v. New York Central Ry. Co.*, *supra*, 401 F.2d 634, 637-638; *De Lima v. Trinidad Corp.*, *supra*, 302 F.2d 585, 587-588; *Page v. St. Louis Southwestern Ry.* (CA5th, 1963) 312 F.2d 84, 91-92; *Dutton v. Atchison, Topeka and S.F. Ry. Co.*, *supra*, 576 S.W.2d 782; *Parker v. Atchison, Topeka and S.F. Ry. Co.*, *supra*, 263 Cal.App.2d 675, 680-681, 70 Cal.Rptr. 8.) This ostensible conflict is of course no conflict at all, since the assessment of instructional error and resulting prejudice is a case-by-case function which necessarily turns upon the facts of each individual case.

The only cases which have *ever* expressed any disapproval of any instruction based on the *Rogers* language quoted above merely disapproved retention of the language concerning the test of a *jury case*, which, as seen above, states a standard which is inappropriate for jury deliberations once the issue has been submitted to the jury. (See, *e.g.*, *Page v. St. Louis Southwestern Ry.*, *supra*, 312 F.2d 84, 91-92; *Bertrand v. Southern Pacific Co.* (CA9th, 1960) 282 F.2d 569, 573; *Parker v. Atchison, Topeka & S.F. Ry. Co.*, *supra*, 263 Cal.App.2d 675, 679, 70 Cal.Rptr. 8.) These

cases, of course, not only do not muddy the law, they clarify it.

In sum, despite Southern Pacific's contortions, there is not the slightest confusion in the Courts of Appeals as to the proper content of an FELA causation instruction. The universal message of the cases is that an instruction in the language of *Rogers* or in the language of the controlling statute, or both, is not just proper but mandatory, that traditional proximate cause standards are inappropriate, and that when a mixture of traditional and FELA causation instructions is given, the relative prominence of the language setting forth the FELA standards determines whether or not reversal is required.

2. The notion that the allegedly "argumentative" phrase "no matter how small" somehow gave counsel for Plaintiff an unfair leg up in his argument to the jury (Petition, pp. 11-14) is no less erroneous than Southern Pacific's reading of *Rogers* and subsequent case law. No matter what language the trial court might adopt to express the concept of causation applicable in FELA cases, it could be used in similar fashion in argument to the jury. Even "played any part whatever" and "proximately contributed in whole or in part or played any part," the alternative terms offered by Southern Pacific to replace "played any part, no matter how small," could be so used. Southern Pacific cites no authority in support of this argument and, so far as counsel for Plaintiff have been able to determine, none exists.

Southern Pacific's contention is in actual fact more an attack on the argument of Plaintiff's counsel than it is upon the instruction itself, but the record reveals that absolutely no objection was made at trial to the argument in question [RT 437; 438; 445; 492], so that the point must be deemed waived. (Federal Rules of Civil Procedure, Rule 46; *Rothchild v. Drake Hotel, Inc.* (CA7th, 1968) 397 F.2d 419,

425; 9 Wright & Miller Federal Practice and Procedure: Civil §2472, pp. 454-456.) In any case, even assuming the issue had been properly preserved with appropriate objections, it would be meritless. There was simply nothing confusing or improper or inflammatory about the very limited use of the phrase "no matter how small" five times in the course of a jury argument which spanned some 26 pages of Reporter's Transcript. [RT 435-455; 488-494.] An examination of the portions of the record cited by Southern Pacific will reveal that counsel by no means hammered the "no matter how small" theme into the consciousness of the jurors, nor did he emphasize it out of proportion to its importance in the case. This case was coolly and professionally tried and there was no attempt to obfuscation or distortion either in argument to the jury or at any other time.

3. The contention that Instruction 41 was erroneous and confusing because it omitted any definition of "proximate cause," even though various other instructions used the term in one or another of its forms (Petition, pp. 9-11), must fail for lack of any appropriate objection in the trial court and is in any event meritless.

Rule 51 of the Federal Rules of Civil Procedure provides that:

> ". . . No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury."

No objection of the sort now made was made either in writing [CR 25] or orally in the trial court [RT 403-425; 529]. Waiver aside, there is nothing so inherently mysterious about the term "proximate cause" that it necessarily requires its own special definition. The terms "cause" and

"proximate cause" were used pretty much interchangeably throughout the instructions and the jury must have seen that they meant, for purposes of the lawsuit, precisely the same thing. Indeed, the Court of Appeals expressly so found. (Appendix A to Petition, p. 1.)

B. There Was Ample Competent Evidence to Justify an Award of Damages for Future Pain and Suffering and in Any Event Southern Pacific Failed to Object to Submission of the Issue to the Jury and Thus Waived the Point.

Southern Pacific contends that the law requires competent proof that future pain and suffering will occur before damages can be awarded for such pain and suffering and that such competent proof was lacking here. (Petition, pp. 15-19.)

The record, however, contains ample evidence from which the jury could properly have found that Plaintiff would continue to suffer significant back pain for the rest of his life. For one thing, as documented in the Statement of the Case above, Plaintiff had suffered back pain continuously from the time of the injury to the time of trial, a period of over two years, and had enjoyed no improvement of his condition in the six month period preceding the trial. [RT 304.] Moreover, the radiologist who performed the thermogram on Plaintiff over a year after the accident testified that the thermogram objectively established a continuing irritation of the fifth lumbar nerve on Plaintiff's left side, for which the most likely cause was either a herniated lumbar disc or a scarring of the nerve root. [RT 161; 165-171.] It is an elementary fact of life, of which any ordinary juror may be assumed to be aware, that herniated discs and scarred nerve tissue are extremely unlikely to regenerate or

improve with time. Quite the contrary, such conditions almost always get worse.

All that the law requires by way of proof of future pain and suffering is that it be shown to be reasonably probable or reasonably certain to occur (Stein, Damages and Recovery — Personal Injury and Death Actions (1972), §15, pp. 24-25), and the jury was so instructed here. [RT 521.] The evidence just summarized more than satisfied that requirement.

Southern Pacific attempts to invoke the rule, observed in some jurisdictions but never applied in an FELA case, so far as we are aware[1], that an award of damages for future pain and suffering for an injury whose symptoms are subjective in nature is appropriate only when supported by medical testimony. (Petition, pp. 16-18.) This so-called rule, however, would be unavailing here for at least three reasons, even if it were applicable. First, the injury herein was not merely "subjective" but was objectively verified by means of highly reliable and accurate thermography technology. [RT 156; 161-167.] Second, medical testimony is not required even in cases of "subjective" injury where there is sufficient evidence of continuing pain and suffering between the time of the original injury and the time of trial to warrant the conclusion that such pain and suffering will persist in the future. (*Mariner v. Marsden* (1980, Wyo.) 610 P.2d 6; *Bitzan v. Parisi* (1977) 88 Wash.2d 116, 558 P.2d 775; *Castro v. Giacomazzi Bros.* (1949) 92 Cal.App.2d 39, 46, 206 P.2d 688; *Alamo v. Del Rosario* (D.C. Cir., 1958) 98 F.2d 328, 329-330.) Here there is plenty of such evidence, as already seen. Finally, there *was* medical testimony which would support a finding of significant per-

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[1]Not even *Campbell v. American Foreign SS Corp.* (CA2d, 1941) 116 F.2d 926, a Jones Act case cited by Southern Pacific, so holds.

manent injury and consequent permanent pain and suffering, as also noted above.

If Southern Pacific in truth believed that there was no substantial evidence of the reasonable certainty of future pain and suffering, as it now appears to contend, it should have objected to the giving of any instruction whatsoever on future pain and suffering, or perhaps it should have offered instructions setting forth the limitations upon recovery for such future pain and suffering which it now urges are applicable. It did neither of these things. [RT 403-425; CR 25.] Having permitted, through its own inaction, the submission of the issue of future pain and suffering to the jury under instructions which are not claimed to be in any way an incorrect statement of the law, Southern Pacific should be deemed to have waived the point for purposes of its appeal. Indeed, the Court of Appeals so ruled (Appendix A to Petition, p. 2.)

Conclusion.

The arguments advanced by Southern Pacific are meritless and trivial and do not warrant review by this Court. The law as declared and applied by this Court and by the Courts of Appeals is clear and without conflict and it was correctly applied by the courts below in this case. For these reasons and the reasons stated above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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